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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 543

UNITED STATES OF AMERICA, *Petitioner*

v.

STATE OF MARYLAND, for the use of MARY JANE MEYER, et al., *Respondent*

UNITED STATES OF AMERICA, *Petitioner*

v.

STATE OF MARYLAND, for the use of VANCE LEWMAN BRADY, et al., *Respondent*

UNITED STATES OF AMERICA, *Petitioner*

v.

CAPITAL AIRLINES, INC., *Respondent*

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and conclusions of law of the District Court on the issue of agency are fully set

forth at J.A.[1] 679-688. The memorandum opinion of the District Court on the agency issue appears at J.A. 679. The opinion of the District Court on negligence appears at J.A. 725-728, and on damages at J.A. 789, 790 and 844. The conclusions of law by the District Court on the negligence issue appear at J.A. 853, as do that Court's findings of fact with reference to Capital Airline's damage. The judgment orders appear at J.A. 855, 856.

The opinion of the United States Court of Appeals for the District of Columbia Circuit is fully and correctly set forth in Petition, Appendix A, pages 1a-14a, and is reported at 322 F.2d 1009.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Is a person who is employed on a full-time basis under the provisions of 32 U.S.C. § 709(a), as a caretaker of federal property, an employee of the United States under the provisions of the Federal Tort Claims Act?

2. If a person so employed is an employee of the United States, then, did the United States have sufficient right to control him at the time of the occurrence so that the United States, if a private person, under the respondeat superior law of Maryland, would be liable for his negligence under the Federal Tort Claims Act?

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[1] J.A. references are to the Joint Appendix filed in the Court of Appeals and in this Court.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Tort Claims Act, Title 28, Sec. 1346, U. S. Code, and the National Defense Act of 1916 (39 Stat. 166) as amended, Title 32, Sec. 709, U. S. Code, are set forth in the Petition, at pages 3-4.

There are additional pertinent parts of regulations which will be found in the Appendix of this brief. These are the following:

Plaintiff's Exhibit No. 15, National Guard Regulations No. 75-16,

Plaintiff's Exhibit No. 16, National Guard Regulations No. 75-16, Superseded.

Plaintiff's Exhibit No. 17, ANGR 40-01.

Plaintiff's Exhibit No. 8, ANGM 40-01, Air National Guard Manual.

Defendant's Exhibit No. 7, AFR 45-2.

Defendant's Exhibit No. 9, ANGR 50-01.

Additionally the following statutes are contained in the Appendix:

5 United States Code 751:

Article 1A, sec. 10, Maryland Annotated Code 1951.

STATEMENT

The cases were tried in the United States District Court for the District of Columbia in two different stages. First, a trial was had on the question whether the maintenance supervisor (caretaker), flying the United States owned jet aircraft was an employee of the United States, acting in the scope of that employment within the purview of the Federal Tort Claims

Act, at the time of the occurrence (J.A. 12, 689). This issue was resolved in favor of Respondents (J.A. 687-688). Thereafter, a second trial was had in the same court on the remaining issues of negligence and damages (J.A. 689, 692), and the lower court found for Respondents on those issues (J.A. 727-728). Subsequently, the United States Court of Appeals for the District of Columbia Circuit, affirmed on all issues except as to the value of the Capital Airlines plane destroyed in the accident.

As pointed out by Petitioner (Petition 12), the United States District Court for the Western District of Pennsylvania, on substantially the same record, has also found against the United States in two cases instituted against the government in behalf of the dependent next of kin of two passengers who were riding in the Capital Airlines airplane at the time of the fatal accident.[2] The detailed findings of the District Court in the instant case, as affirmed by the Court of Appeals, are based on the following evidence adduced at the trial.

a. The Occurrence

The actions arose out of a mid-air collision between a Capital Airlines Viscount Airliner and a T-33 jet airplane owned by the United States and allocated to the Maryland Air National Guard. The collision occurred on May 20, 1958, over the State of Maryland, while the Viscount was proceeding on a regularly scheduled commercial flight from Pittsburgh to Baltimore Friendship Airport on a civil airway. The T-33 airplane was being operated by one Julius R. McCoy

[2] *State of Maryland v. United States*, 200 F. Supp. 475 (W.D. Pa. 1961).

on a local area flight out of Martin Airport, Baltimore, Maryland.

b. The Employment Relationship

The United States provided the airplanes, paid the cost of the fuel used by all the airplanes allocated to the unit, including the T-33 airplane involved, provided all the equipment for the Guard Unit, paid the salaries of the civilian personnel to maintain said federal property, furnished the new and spare parts required for the said equipment, and made the major repairs needed by the T-33 airplane involved and the other planes allocated to the Guard Unit (J.A. 678; Dist. Ct. Finding 4).

On the date of the accident, McCoy was employed as a full-time civilian air technician under the provisions of 32 U.S.C. § 709(a), which provides for the employment of civilian caretakers of United States property (J.A. 81, 330). He was also a commissioned officer in the Air National Guard of the State of Maryland (J.A. 37-38, 41; Dist. Ct. Finding 5).

The National Guard Bureau is authorized to regulate employment and rates of compensation of civilian caretakers of federal property; Department of the Army General Order 96, dated November 9, 1951 (J.A. 214); 32 U.S.C. § 32 (which became 32 U.S.C. § 709 (a)).

Pursuant to 32 U.S.C. § 709(a), the Secretary of the Air Force, through the National Guard Bureau, promulgated Air National Guard Regulation 40-01, dated 20 December 1954 (hereinafter referred to as ANGR 40-01), which provided that the basic authority for employment of National Guard civilian personnel is contained in Section 90 of the National Defense Act,

as amended (which became 32 U.S.C. § 709(a)). This authority of the federal government to employ, fix rates of pay, establish work hours, supervise and discharge employees, within the purview of this regulation, was delegated by the Secretary of the Air Force to the Adjutants General of the several states, subject to provisions of law and such instructions as might be subsequently issued by the National Guard Bureau. ANGR 40-01 and Air National Guard Manual 40-01, designated the jobs in the air technician categories and prescribed the duties and requirements of the job and the prequisite training for such employment (J.A. 655-660; District Ct. Finding 6, Appendix, pp. 4a-20a).

Under the authority of ANGR 40-01, the National Guard Bureau promulgated Air National Guard Manual 40-01, dated 1 March, 1958 (hereinafter referred to as ANGM 40-01), which states that its provisions will govern all Air National Guard civilian employees (J.A. 211). Said manual further provides that the "authority of the National Guard Bureau to regulate the employment and rates of compensation is contained in Department of the Army General Order 96, dated 9 November, 1951, subject, 'Delegation of Authority for the Employment and Fixing of Salaries for All Caretakers and Clerks in the National Guard Bureau'" (J.A. 214; Dist. Ct. Finding 7, Appendix, p. 11a).

Air technicians such as McCoy are full-time civilian personnel who are placed at National Guard installations to maintain federal property and records, to the prescribed standards of the Air Force, that cannot be maintained by the normal personnel assigned to the Guard Units. In order to qualify as an air technician (caretaker) under the provisions of ANGR 40-01,

McCoy attended a nine month course for maintenance officers at the United States Air Force Base and Maintenance School at Chanute Air Force Base, Illinois (J.A. 42). He was required to attend the school at Chanute by order of the Secretary of the Air Force. While attending this school, he was paid by the United States Air Force finance office (J.A. 43; Dist. Ct. Finding 8).

At the time of the occurrence, in addition to carrying out his duties as Aircraft Maintenance Chief, McCoy was acting Maintenance Supervisor for the Base in the absence of Major Mitchell, who held this assignment but was away on a training program (J.A. 40, 48, 71; Dist. Ct. Finding 12).

In these positions McCoy was required to supervise the maintenance of twenty-eight aircraft, and of all other equipment allocated to the Maryland Air National Guard by the United States, in accordance with Air Force Regulations, and also to supervise the seventy-five to eighty civilian maintenance personnel who maintained the equipment (J.A. 37, 38, 40, 47, 68; Dist. Ct. Finding 13).

To insure that the unit operated the equipment in accordance with standards prescribed by the United States Air Force, an Air Force Adviser on active duty with the United States Air Force was stationed at Martin Field. If he were dissatisfied with the maintenance situation, the adviser would so report to the Air Force (J.A. 330; Dist. Ct. Finding 10). In addition, McCoy was required to submit monthly reports respecting the equipment to the National Guard Bureau (J.A. 43).

United States Air Force Inspection Teams made inspections to determine whether the air technicians were complying with the requirements of ANGR 40-01. These inspections were made annually to determine whether the technicians were qualified to continue to hold their jobs (J.A. 307; Dist. Ct. Finding 11).

If the United States found that a civilian employee of an Air National Guard Unit was not meeting the United States Air Force requirements, it could, in practical effect work his discharge by stopping his salary. (J.A. 335; Dist. Ct. Finding 11).

As an air technician, i.e., in his civilian capacity, McCoy was employed at the base during the normal work week from 8:00 A.M. to 4:30 P.M., Tuesday through Saturday, except for two Saturdays a month. On those two Saturdays, he was employed in his military status as an officer in the Air National Guard and as Squadron Maintenance Officer (J.A. 38; Dist. Ct. Finding 14).

McCoy, in his full-time air technician job, was paid an annual salary in the sum of $7,500.00, by check drawn on the United States. Additionally, he was paid approximately $2,000.00 per year by the United States, for his part-time military duties (J.A. 41; Dist. Ct. Finding 24).

c. Purposes of the Flight By McCoy On the Day of the Occurrence

On the morning of Tuesday, May 20, 1958, a day during which he normally worked in his civilian capacity as an air technician, McCoy reported to the base and commenced work at the usual starting time on his full-time civilian caretaker job as aircraft maintenance chief (J.A. 67, 68; Dist. Ct. Finding 27), and as

acting maintenance supervisor in Major Mitchell's absence (J.A. 77-78; Dist. Ct. Finding 12). Before the flight, he performed certain daily administrative duties to establish the order of business for the day. This work included the determination of which aircraft would be maintained and gotten ready for flight or repair, if necessary, and the work assignments of various individuals (J.A. 67, 78). At the time of the occurrence, McCoy was flying in his civilian capacity as a caretaker of government property (J.A. 80; Dist. Ct. Finding 35). On the day of the occurrence, he was recorded as present at the base in his civilian capacity, was carried on the roster in his air technician pay status, and was paid by the United States Treasurer in this capacity (J.A. 77-78; Dist. Ct. Finding 27).

McCoy's status as acting maintenance supervisor, and aircraft maintenance chief made it desirable for him to make frequent aerial flights (J.A. 58, 59, 70-71, 81, 164, 306, 605-606). This was an important facet of his civilian work in maintenance (J.A. 75-77, 79, 164). As an air technician-aircraft maintenance supervisor, one reason for this flight or any flight that he made on this job was to insure the proper maintenance of the equipment over which he had general supervision (J.A. 69, 75-76). While flying he could better observe from the air (a) obstructions that might be on the runway; (b) exposed lips of runways that might cause an accident; (c) foreign object damage; (d) cleanliness of his ramp (a piece of wire on the runway or ramp can be sucked into and ruin a $100,000.00 jet engine); (e) condition of the airport; (f) efficiency of the tower personnel; and (g) whether the maintenance people are in front of the intake scoop when

the aircraft is parked, and whether they are waiting until the plane stops before they insert the chocks (J.A. 140). McCoy as Maintenance Supervisor, in the course of each flight, by the very nature of his function and duty, would be observing the product he was required to maintain for better maintenance, safer aircraft, etc. (J.A 164). In short, whenever he flew he could get a better appreciation of the way the people under his supervision were doing their job. (Dist. Ct. Finding 21).

While the job description of the aircraft maintenance chief's position set forth in the civilian personnel manual, ANGM 40-01, contains no requirement that the holder of the position be a pilot or that he fly aircraft, the job description for the position of maintenance supervisor provides that it is "desirable" that the incumbent be a rated pilot on flying status to enable him to "make test flights on assigned aircraft" (J.A. 217; Dist. Ct. Finding 19, Appendix 17a). It is desirable for the maintenance officer to have a flying status to better understand the quality of the maintenance and the condition of the equipment (Dist. Ct. Findings 17, 18, 19 and 20). General Wilson, head of the federal agency responsible for the promulgation of ANGM 40-01, and Kilkowski, McCoy's immediate superior in his civilian technician job, both testified it was desirable for the head of the maintenance section to have a flying status, as the equipment can only be properly evaluated by flying it, and his flying the planes would give the other pilots a safer feeling because they would know that the person maintaining the plane was also flying it. Such flights by the maintenance supervisor would make for better maintenance, safer aircraft, and as a result, a better unit (J.A. 164). It was also part

of McCoy's duties in his air technician civilian job to fly functional check flights (J.A. 75-77, 79, 81; Dist. Ct. Finding 21).

McCoy also flew the airplanes to satisfy the requirements of Air Force Regulations (AFR 60-2) and to increase his pilot rating. Since he had to maintain proficiency as a pilot in order to be qualified and competent to perform these flights, even flying for proficiency related to McCoy's civilian job (Dist. Ct. Finding 21). During the course of the flight in question, McCoy checked the efficiency of the equipment and evaluated the quality of the maintenance (J.A. 162-164, 493-495; Dist. Ct. Finding 20, 22). He watched the instruments and observed that the plane was behaving properly. He likewise had a better opportunity to observe the quality of the maintenance by flying the plane. (J.A. 70, 399). The particular flight at the time of the accident was part of McCoy's function to maintain proficiency and maintain the equipment (Dist. Ct. Finding 23). It was not a training mission (J.A. 80, 121, 136, 146-47, 152-53, 161-63, 586-87). The uncontradicted evidence showed that the form used for this flight was the same one used for all flights regardless of the nature of the flight, so that this form would have been used in the case of flights made in connection with the maintenance of the plane. (J.A. 69). While it was necessary for a person to have a military pilot's rating in order to fly a United States military plane, a person flying a plane might be performing his civilian duties as McCoy was doing on the occasion in question, and as he had frequently done on prior occasions (J.A. 162-164). He could only occupy one pay status at a time, either that of a civilian caretaker in maintenance work, or that of a member of the Air National

Guard in a military capacity (J.A. 586-87); Dist. Ct. Finding 25). In May, 1958, at the time of the accident, McCoy had accumulated more than the number of hours for which he could earn flight pay under the provisions of AFR 60-2 for the period in question. His flight on May 20, 1958, therefore, was not to earn flight pay (J.A. 70, 135-36; Dist. Ct. Finding 26).

McCoy applied to Kilkowski for permission, and received it, to make the flight on May 20, 1958. Kilkowski, like McCoy, was a civilian employee and held the air technician position of base detachment commander; Kilkowski was also a member of the Maryland Air National Guard (Dist. Ct. Finding 15-16). The flight was termed a "proficiency flight." Proficiency flights have multiple purposes, including evaluation of maintenance of the equipment, which was a responsibility of McCoy in his employment under 32 U.S.C. Sec. 709(a) (Dist. Ct. Finding 21).

McCoy was accompanied on the flight in question by a passenger, Donald Chalmers, who was a member of the Maryland Army National Guard. Chalmers was required to sign a release prior to the flight, releasing the United States and the State of Maryland from any liability in the event of Chalmers injury or death during the flight because of "negligence, faulty pilotage, or structural failure of the aircraft." (Appendix A; Dist. Ct. Findings 16, 29).

d. Circumstances Subsequent To the Accident Establishing the Employment Relationship

Subsequent to the occurrence, McCoy received benefits under the provisions of the Federal Employees' Compensation Act, 5 U.S.C., § 751, which provides for payment of compensation by the United States to an

employee of the United States injured "while in the performance of his duty." The papers pertaining to McCoy's compensation claim were processed by Col. Ebaugh, United States Property and Fiscal Officer for the State of Maryland, a Federal employee. The forms needed for the claim were provided by the Department of Labor and used in all instances for Caretakers—Technicians (J.A. 240-241). Col. Ebaugh certified as follows:

> "I certify that Julius R. McCoy was working as a Civil Employee of the United States at the time of injury and *not* as a member of the Maryland National Guard:" (J.A. 228)

This certificate was required by the United States Department of Labor and Col. Ebaugh's investigation lead him to believe that he was justified in filling out this certification (J.A. 245).

The Bureau of Employees Compensation, Department of Labor, handled this case in the same manner as cases involving other employees of the United States Government. Its employees processed the claim of McCoy and adjudicated that he was in the performance of his duty as an employee of the United States at the time of the accident.

Subsequently, at the request of the United States, and pursuant to Statute, McCoy executed an assignment to the United States under the provisions of the Federal Employees' Compensation Act, of his rights of action against Capital Airlines and others and said assignment, prepared by the United States, stated that he was employed by the Department of the Air Force as an Aircraft Maintenance Chief (Pilot) at the time of the occurrence (J.A. 225-227). The Petitioner at no

time offered testimony to show that a mistake or error was made by either Col. Ebaugh or the Department of Labor.

(c) The Air National Guard

The overall purpose of the National Guard is to provide a pool of combat ready reserve forces to be used in case of a national emergency involving the defense of the United States; 32 U.S.C. Section 102.

The Air National Guard operates at large without regard to state boundaries. According to Standing Operating Procedure No. 3, promulgated January 2, 1957 (Defendant's Ex. 3) (J.A. 663-664), the local flying area for the 104th Fighter Interceptor Squadron over which flights were made daily by the squadron McCoy was a member of, included the States of Maryland, Pennsylvania, New Jersey, Delaware and Virginia. The squadron's overall training area was considered to be in the continental United States (Respondent's (Appellees') Circuit Court Brief Supplemental App. 2a).

The Air National Guard had some twenty-four wings of which seventy-three squadrons were equipped with jet fighters. All of these units had a D-Day mission with a major command in the Air Force (J.A. 321).

The 104th Fighter Interceptor Squadron was part of the air division at Andrews Air Force Base. As such, it had been given a D-day mission with the Air Defense Command in the role of fighter interceptor squadron for which it was trained and equipped. In case of emergency or requirement by the Air Force, the 104th was required to be able to get at least fifty percent of its aircraft fully armed in the air in the first hour. (J.A. 333)

SUMMARY OF ARGUMENT

There are no important or compelling reasons for granting the writ here. Two questions only, exist. The first requires a determination as to whether the maintenance-supervisor (caretaker) flying the plane was an employee of the United States, and the second whether he was acting within the scope of his employment under the applicable law of Maryland at the time of the accident. Actually, the decision below turns upon its own facts, and it will, contrary to petitioner's claim, affect only a relatively few persons. The United States is responsible here because the pilot of the plane, McCoy, was employed by it as a caretaker under the authority of 32 U.S.C., Section 709, and because at the time of the accident he was performing his civilian duties as maintenance supervisor or aircraft maintenance chief for the United States (which Petitioner concedes, Petition, p. 11). The United States is thus liable because if it were a private person it would be responsible to respondents in accordance with the law of Maryland.

The detailed findings of fact of the District Court demonstrate both the extent of control of the United States over McCoy and likewise its right to control.

The decision of the lower court does not conflict in any way with decisions of other Circuits. Both under the Federal and State law the decision here was correct.

ARGUMENT

1. There Is No Important Question of Federal Law Involved

Persons employed as "caretakers" of federal property under the provisions of 32 U.S.C. § 709(a) are employees of the United States within the purview of

the Federal Tort Claims Act. This employment relationship is determined by federal laws and regulations. Every court of appeals which has considered the question has held, by reason of the extent of control the United States has over caretakers, that caretakers are employees of the United States within the purview of the Federal Tort Claims Act. There is no conflict between the various courts of appeals on this issue, despite Petitioner's contention to the contrary.

Once the employer-employee relationship is established under federal law, the question whether the employee was acting within the scope of his employment under the Federal Tort Claims Act is determined under the law of the state where the negligence occurred; *Williams* v. *United States*, 350 U.S. 857 (1955). The test of "scope of employment" under the law of Maryland is the "right to control," *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A.2d 296, 301 (1957), and Petitioner admits there was no misapprehension as to the state law by the Court of Appeals in this case (Petition 22). Therefore, no supposed error in failing to correctly apply federal law in determining scope of employment can constitute any basis for granting the writ.

The first ground advanced by Petitioner for granting the writ is that the court of appeals decided incorrectly that a caretaker employed under 32 U.S.C. § 709(a) is an employee of the United States (Petition 17). All courts of appeals which have passed upon the question, have held that a caretaker employed under the provisions of that statute is an employee of the United States within the purview of the Federal Tort Claims Act; *United States* v. *Holly*, 192 F. 2d 221 (10th Cir.

1951); *Elmo* v. *United States*, 197 F. 2d 230 (5th Cir. 1952); *United States* v. *Duncan*, 197 F. 2d 233 (5th Cir. 1952); *Courtney* v. *United States*, 230 F. 2d 112 (2d Cir. 1956); *United States* v. *Wendt*, 242 F. 2d 854 (9th Cir. 1957); *Pattno* v. *United States*, 311 F. 2d 604 (10th Cir. 1962), cert. denied, 373 U.S. 911 (1963).

In each of the above cases, the court held that a federal statute creates the position of unit caretaker and outlines his duties generally; that the pay for his services is wholly from federal funds; that federal regulations define the duties and responsibilities of the caretaker in detail; that the Secretary of the Army (Air Force) fixes the maximum pay scales, and then delegates to the adjutant general of the state the task of setting actual rates of pay, within limits fixed by federal regulations; that the primary duties of caretakers are the care and maintenance of federal property allocated by the United States to the National Guard for military purposes; that the Secretary of the Army (Air Force) through the Chief of the National Guard Bureau and through the state adjutant general to whom certain powers have been delegated, has the full right to control the employment, work, and discharge of the caretaker; and that the federal government has the right to direct and control the method and means by which a caretaker performs his service.

These factors have satisfied all courts of appeals which have considered the question that the status of a caretaker as a civilian employee of the United States is clearly distinguishable from that of a military member of a non-activated National Guard Unit. Until it filed the present petition, the United States accepted the decisions of the courts of appeals and did not attempt to appeal therefrom.

Petitioner's contention that all of these decisions were erroneous and that this Court should grant the writ and hold that caretakers are not federal employees is contrary to the position of the Department of Justice as set forth by Deputy Attorney General Walsh, on May 23, 1960. At that time, Judge Walsh advised the Senate Committee on the Judiciary that legislation which would have amended the Federal Tort Claims Act, to expressly include caretakers as employees of the United States was unnecessary because "an unbroken series of court decisions" had held the Federal government was responsible for the torts of caretakers "because of the control relationship between such persons and the Federal Government." (Opinion of Court of Appeals, Petition, Appendix A, 8a, 9a, n; Hearings on S. 1764 before the Senate Committee on Judiciary 86th Congress, 2d Session (1960)).

Congress has had many opportunities, at the time of the passage of the Federal Tort Claims Act and subsequent thereto, to indicate that "caretakers" were state employees, if it chose to do so. It has several times amended this Act, but has remained silent as to "caretakers." Obviously, Congress did not intend to remove "caretakers" from their recognized federal status.

In 1960, more than two years after the occurrence complained of, Committees of the Senate and House of Representatives had under consideration but did not report out for passage, a bill to amend the Federal Tort Claims Act. This bill would have made the United States absolutely liable for the negligence of members of non-activated guard units and specifically defined "employees" to include "caretakers." Peti-

tioner contends (Petition 20, Appendix B, 21a-23a) that the fact these committees did not report out the bills for the consideration by the Senate and House is an indication that Congress agreed there was "uncertainty" as to the status of caretakers. And Petitioner further contends that by then providing a limited administrative remedy applicable both to members of the guard and civilian personnel, Congress rejected the *Holly* line of decisions (Petition, Appendix B, 23a). These contentions were carefully considered by the Court of Appeals (Petition, Appendix A, 8a, 9a), and were disposed of adversely to the Petitioner for compelling reasons.

The court noted that the Department of Justice through the Deputy Attorney General advised the Senate Committee that the amendment to expressly include civilian caretakers under the terms "employees of the Government" was "unnecessary" because it would merely restate existing law. And the court stated that the new limited administrative recovery was merely an alternative to the traditional judicial remedy under the Federal Tort Claims Act (a conclusion with which Petitioner apparently agrees (Petition 16)), and could not have any application to the remedy of the plaintiffs for the injuries and damages caused in 1958.

At the time the proposed amendment was under consideration, no action was taken by Congress to relieve the United States from liability for the negligence of caretakers under the Federal Tort Claims Act, although, as shown, its attention had been specifically called to the fact that the courts were uniformly holding that "caretakers" were employees of the United States under that Act.

Petitioner argues (Petition 15) that if the rule enunciated in the "caretaker" cases continues to be applied, it lays the federal government open to liability for the acts of nineteen per cent of the membership of the Air National Guard, since these nineteen per cent are civilian employees. The government does not indicate what percentage of these civilian employees are technicians, and nowhere indicates what portion of their time is spent in the scope of their federal employment. And the argument is completely unrealistic as can be seen by examining the situation at Martin Field Base where McCoy was stationed. Of approximately sixty-five civilian air technicians working at that base during the civilian work week, McCoy was the only officer maintenance supervisor stationed there who had authority to fly and test airplanes. If that ratio held true generally, it would be one sixty-fifth of nineteen per cent of the Air National Guard who might be in the position to operate the planes, for whose conduct the government would be liable during the time when the plane was being operated during the civilian work week by the civilian technician as part of his civilian job. But this, in any event, is beside the point. The government is only liable in these cases if the civilian technician is acting within the scope of his employment as a civilian technician and if he negligently causes harm to other persons. This is what Congress intended, and this is what the courts have held.

2. The Lower Courts Correctly Interpreted and Applied the Respondeat Superior Law of Maryland

As shown in the preceding section, the courts have consistently held that a caretaker employed under the provisions of 32 U.S.C. §709(a), is an employee of

the federal government. These decisions rest upon statutes and regulations which clearly show the broad extent of federal control over "caretakers" of United States property allocated for National Guard use.

It having been established that a "caretaker" employed under 32 U.S.C. Sec. 709(a) is an employee of the United States, then the question whether the employee was acting within the scope of his employment, at the time of the occurrence, so that the Federal Government, if a private person, would be liable to the claimant is answered by a consideration of the evidence under the applicable law of Maryland, the place where the negligence occurred; *Williams* v. *United States*, 350 U.S. 857 (1955).

It is clear under Maryland law that a person may be an employee of two employers for a given act. *Keitz* v. *National Paving & Contracting Company*, 214 Md. 479, 134 A 2d 296 (1957).

A fair analysis of the evidence discloses that McCoy was flying either solely in his civilian air technician status or in a dual capacity of a military pilot (because he needed the pilots license to fly the plane) and a civilian air technician at the time of the accident (J.A. 79, 80, 118, 587, 588). And he was then doing the work of an air technician in a supervisory position (J.A. 70, 79, 80, 121, 137, 138, 139, 140). McCoy was not in a flying training period at the time of the accident. (J.A. 80, 121, 136, 146, 147, 152-153, 161-163, 167, 586-587.)

Under Maryland law, there is a presumption that the operator of a vehicle is the agent, servant or employee of the owner thereof. The presumption is rebuttable. *Keitz*, *supra*; *Fowser Fast Freight* v. *Sim-*

mont, 196 Md. 584, 588, 78 A. 2d 178 (1946); *Pennsylvania R.R.* v. *Lord*, 159 Md. 518, 151 A. 400 (1930).

Under the law of Maryland, it is also presumed that the agent, servant or employee was operating the vehicle within the scope of his employment. This presumption may also be rebutted. *Brown* v. *Bendix Aviation Corporation*, 187 Md. 612, 621, 622, 51 A. 2d 292 (1947); *Erdman* v. *Horkheimer*, 169 Md. 204, 206, 207, 181 A. 221 (1935).

Article 1-A, Sec. 10, p. 197, Anno. Code of Maryland, (App. p. 22a) provides that the liability of an aircraft owner for mid-air collision is to be determined by the law applicable to torts on land. Under this statute, the presumption of agency through ownership would apply to aircraft.

Here the jet aircraft involved was owned by the United States, was in the possession of McCoy, and was being piloted by him. Under the law of Maryland, the state where the airplanes collided and crashed, a presumption arises from those facts that McCoy was acting as an employee of the United States within the scope of his employment at the time of the occurrence.

Although the presumption of agency may be rebutted, the burden of overcoming it rests upon the defendant. The Government failed to satisfactorily rebut this presumption. Instead, the evidence overwhelmingly supports the Respondents' position that at the time of the occurrence McCoy was acting as a civilian employee of the United States in the scope and course of his employment.

The Court of Appeals examined the law of Maryland concerning the liability of a private person for

the negligence of his agent and held that the decisive test for determining a master-servant relationship is the "right of control." (Petition, 12a) That this is a proper interpretation of Maryland law can be seen from *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957), where the court said:

> ". . . it is not the manner in which the alleged master actually exercised his authority to control and direct the action of this servant which controls, but it is his *right* to do so that is important. *Sun Cab Co.* v. *Powell*, 196 Md. 572, 578, 77 A. 2d 783 . . ." [Emphasis in the original.]

Petitioner admits that "The result reached by the Court of Appeals did not stem from any misapprehension as to State law." (Petition 22).

Whether the United States had the "right to control" the action of McCoy at the time of the occurrence depends on the employment relationship that existed between McCoy and the United States at that time. To determine the nature of the employment relationship, it is necessary to examine ANGR 40-01 3 (b), wherein the Department of the Air Force expressly delegates the authority of federal officials to supervise caretakers in the performance of their work, subject however to instructions that may be issued by the National Guard Bureau (J.A. 658).

The Federal government did not stop with its right to control McCoy in the performance of his civilian work. It actually exercised control over him.

National Guard Regulation No. 75-16 (NGR 75-16), entitled "Accounting Clerks and Caretakers" issued

by order of the Secretary of the Army, through the National Guard Bureau on December 29, 1947 (Pltf's. Ex. 15, J.A. 634-645), and ANGR 50-01, issued November 27, 1950 (Def's. Ex. 9, J.A. 671-677) disclose, the detailed control which the United States exercised over caretakers employed under the authority of 32 U.S.C. Sec. 709, and the use of the Adjutants General of the State made by the Department of the Air Force, and by the Chief, National Guard Bureau to carry out Federal orders, directives, and procedures governing caretakers (App. pp. 1a-3a, 21a). Any authority exercised over McCoy as a civilian maintenance supervisor stems from a direct delegation of authority by the Secretary of the Air Force. Col. Kilkowski, McCoy's immediate superior, was the Base Detachment Commander to whom the Adjutant General delegated the actual work of daily supervision of McCoy in his capacity as an air technician-caretaker, working in a supervisory maintenance position. McCoy's work was confined exclusively to Federally-owned equipment. And any authority or control exercised over him was in conformity with Federal directions and regulations issued by the Air Force and the National Guard Bureau. (Defendant's Exhibit 7, A.F.R. 45-2, 20a)

As was pointed out by the Court of Appeals, the functions lodged by the United States in the State Adjutant General did not serve to supplant this right of control in the United States, though it may be said to have been ancillary thereto. (Petition, Appendix, A. 7a).

Following the accident there were admissions and affirmative acts of authorized employees of the United States confirming the fact that McCoy was acting in his capacity as an employee of the Federal Government at the time of the accident.

The certificate prepared by Col. Ebaugh is an admission against interest on the part of the United States. *Chicago* v. *Greer*, 9 Wall 726 19 L. ed. 769 (1870), 20 Am Jur., *Evidence* Sec. 603, p. 516 (perm. ed. 1939). Col. Ebaugh, in certifying McCoy was an employee of the United States at the time of the occurrence, was acting in his official authorized capacity (J.A. 276); therefore, his certificate is an admission by the United States.

The fact that the United States took an assignment from McCoy is also further evidence that he was an employee of the Government at the time of the occurrence. *Pittsburg Construction Co.* v. *Gannon*, 46 U.S. App. D.C. 131 (1917).

It is clear from the foregoing authorities that the certification of Col. Ebaugh as to McCoy's status at the time of the occurrence, the subsequent payment of compensation benefits, and the assignment taken by the United States from McCoy, all must be taken as evidence tending to show that McCoy was an employee of the United States Government at the time of the occurrence. They are evidence admissible both as admissions and as records made in the normal course of business. The District Court found that McCoy was actually performing the duties incident to his "civilian caretaker status" at the time of the occurrence, and the Court of Appeals affirmed this finding, stating, ". . . in an ultimate sense the right of control was in the Federal Government at the time and in the circumstances of this accident . . ." (Petition, Appendix A, 7a).

The Court of Appeals further held that the flight in question by McCoy "entailed the performance of

his caretaker and maintenance duties" and, in the performance of "his property maintenance function . . . the ultimate right of control over him was in the United States." (Petition, Appendix A, 6a-7a).

The Petitioner does not question the several indicia relied on by the District Court and the Court of Appeals, but instead argues as to the effect to be given these factors in determining "right of control." The effect to be given these factors is a question of state law, in this case the law of Maryland, and not a federal question. This is not a proper subject for review on a petition for a writ of certiorari. As has been shown, even if the question of "right of control" were solely a question of federal law and therefore subject to review by petition for certiorari, the United States had sufficient "right of control" to make it liable, if a private person, under the law of Maryland for the negligent acts of McCoy.

There must always of necessity be a considerable measure of federal control over Air National Guard units. When the Air National Guard was established, it was done within a framework similar to the Army National Guard, even though there was no genuine connection or relationship between high speed jet aircraft and a state mission. But the courts have always looked to the substance rather than allowing form to cloak reality. If, in fact, federal support were to be withdrawn from the various Air National Guard units, it would mean no federal pay, no airplanes, no fuel, no hangars, no runways, no maintenance mechanics (air technicians), no parts for replacement, no medical care or sickness or death benefits. It would mean no Air National Guard.

3. There Is No Conflict Of Decisions

As to the contention of Petitioner that the decision of the Court of Appeals in this case creates a conflict with the decision in *Pattno* v. *United States*, 311 F. 2d 604 (10th Cir. 1963), cert. denied, 373 U.S. 911 (Petition 24), comparison of the two decisions demonstrates no such conflict. In *Pattno* the court held, at 606, that a "caretaker" is an employee of the United States, citing *United States* v. *Holly*, 192 F. 2d 221 (10th Cir. 1951), and in *Pattno*, footnote 11, cited numerous other cases which followed and approved of the decision in *Holly*. The court however further held that the evidence showed that Meckem, the pilot of a plane, was a flying training instructor engaged at the time of the accident in a flight to evaluate the flying skill of Anderson, a member of the Wyoming Air National Guard, and that while training a member of this National Guard, Meckem was performing work which, both under federal constitution and statutes, was the business and responsibility of the state. Other than holding Meckem was an employee of the United States, as the lower Court found McCoy to be here, any further similarity between that case and this one is simply not present. The lower courts held that Meckem was not acting as an employee of the United States and this court denied certiorari.

Pattno is further distinguishable from the instant case by reason of the fact that in *Pattno*, the Court of Appeals, applying the law of Wyoming, the place of the occurrence, held that under Wyoming law one of the most important tests governing the application of the doctrine of "respondeat superior" is "who *had* control over the servants." This test is much more restrictive than the test for "respondeat superior"

under the law of Maryland. The Maryland test is "who had the right of control," and it is not "the manner in which the alleged master actually exercised his authority to control and direct the action of the servant, . . . but it is his *right* to do so that is important"; *Keitz* v. *National Paving & Contracting Co.*, 214 Md. 479, 491, 134 A. 2d 296, 301 (1957). This broader application of the doctrine of "respondeat superior" under the law of Maryland was relied upon by the Court of Appeals in the instant case. (Petition, Appendix A, 7a, 11a, 12a).

As has been shown, the question whether the United States had a "right to control" caretakers so as to render it liable, if a private person, for the negligent conduct of McCoy, was therefore correctly decided under the applicable law of Maryland.

CONCLUSION

Respondents therefore respectfully submit that the decision below is clearly correct, and that there is no conflict of decisions between the circuits with respect to the issues here involved. The Petitioner has failed to show any "special and important" reason for granting review on a writ of certiorari.

Respectfully submitted

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